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No. 83-2097

In The

Supreme Court of the United States

October Term, 1983

BURGER KING CORPORATION
a Florida Corporation

Appellant,

vs.

JOHN RUDZEWICZ

Appellee.

On Appeal From
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MOTION TO AFFIRM JUDGMENT

THOMAS H. OEHMKE, Esq.
OEHMKE LEGAL ASSOCIATES
639 Beaubien
Detroit, Michigan 48226
313/963-3525

Counsel for Appellee

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QUESTIONS PRESENTED FOR REVIEW

No Appeal as of Right Because Florida Statute Not Declared Unconstitutional

1. Whether the Circuit Court declared—as unconstitutional — Sec. 48.193(1)(g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida)?

2. Whether the Circuit Court only held that "a Florida court can [not] exercise jurisdiction over a nonresident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Florida"?

No Special or Important Reasons to Grant Writ of Certiorari

3. Whether a Writ of Certioari should be denied because the Circuit Court's decision does not conflict with the decision of another federal court of appeals on the same matter?

4. Whether a Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with any decision of the Florida Supreme Court on the same matter?

5. Whether a Writ of Certiorari should be denied because the Circuit Court's decision has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

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67 A.L.R. 3d 1299 12

MOTION TO AFFIRM JUDGMENT

NOW COMES John Rudzewicz, by his attorney, Thomas H. Oehmke, and moves this Court:

Affirm the Judgment

To affirm the judgment of the Circuit Court (under Rules of Supreme Court 16.1(c)) because it is manifest that the questions (on which the decision of this cause depends) are so unsubstantial as not to need further argument.

In an analogous case on point, and in this very Term, this Court denied certiorari in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*[1]

Finally, the Circuit Court did not declare—as unconstitutional—Sec. 48.193(1) (g) of Florida's long-arm statute.

WHEREFORE, Defendant-Appellee moves this Court to affirm the judgment of the Eleventh Circuit Court of Appeals.

———o———

COUNTER JURISDICTIONAL STATEMENT

Burger King Corporation, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit, entered on 13 February 1984, and rendered by denial of rehearing of 22 March 1984.

Contrary to Burger King's own jurisdictional statement, no Florida statute was held unconstitutional. Instead, in answering the question:

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(1) 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 2180 (1984).

> . . . whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami, A7

the Circuit Court only held that:

> . . . the circumstances of the . . . franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. *Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process* (emphasis added). Jurisdictional Statement, A17-A18.

Burger King would have this Court wrongly believe that the Circuit Court declared—as unconstitutional—part of the long-arm statute, namely Sec. 48.193(1)(g) of the Florida Statutes. This is a false premise!

In fact, what happened here was an inquiry on Appellee Rudzewicz's motion to dismiss the Complaint for lack of personal jurisdiction. In this inquiry, the facts presented satisfied the requirements of the Florida long-arm statute; however, the exercise of personal jurisdiction was inconsistent with "due process."

Burger King improperly invokes the jurisdiction of this Court under 28 U.S.C. 1254(2). The invocation is improper because the Florida long-arm statute was not held unconstitutional; rather, its application to the facts of this case was inconsistent with due process.

Thus, since no state statute was declared unconstitutional, Burger King may only file a Petition for a Writ of Certiorari—for it has no "appeal as of right."

———o———

SUMMARY OF ARGUMENT

No Appeal as of Right Because Florida Statute Not Declared Unconstitutional

Indeed, 28 U.S.C. Sec. 1254(2) creates a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution. Yet, that is irrelevant here because there is no "appeal as of right."

Burger King wrongly argues that the Circuit Court "held"—as unconstitutional—Sec. 48.193(1)(g) of Florida's long-arm statute. This is simply false!

The 11th Circuit was testing the *application* of Florida's long-arm statute to Appellee Rudzewicz and, given the lack of sufficient minimum contact with Florida, the *application* of the statute to this defendant, under these particular circumstances, was unconstitutional. In other words, while the long-arm statute passed constitutional muster, its application to Appellee Rudzewicz " . . . would offend the fundamental fairness which is the touchstone of due process." Jurisdictional Statement, A18.[2]

The opinion below was artfully crafted. Certainly, a careful reading reveals no "holding" that this Florida long-arm statute is unconstitutional. Quite differently, the Circuit Court held, "[j]urisdiction *under these circumstances* would offend the fundamental fairness which

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(2) It is instructive that "no court involved in the instant action has certified to the Florida Attorney General the fact that the constitutionality of a Florida Statute is drawn in question" (Jurisdictional Statement, at ii).

is the touchstone of due process." (Jurisdictional Statement, at A18 [emphasis added]).

Because Florida's long-arm statute was not declared unconstitutional, this appeal as of right is not within this Court's jurisdiction. Rules of the Supreme Court, 16.1(a).

No Special or Important Reasons to Grant Writ of Certiorari

No special or important reasons exist to grant a Writ of Certiorari. Thus, according to the Rules of the Supreme Court 17.1(a), Appellant's petition should be dismissed.

The Opinion Below does not conflict with the decision of any other federal court of appeals on the same matter. In fact, each of the five instances when another circuit court has ruled on the same matter, there is agreement with the Opinion Below. This decision below, rendered by the 11th Circuit, agrees with decisions of the 5th Circuit, 6th Circuit, 7th Circuit, and 8th Circuit (Jurisdictional Statement, at 28, n. 48). Thus, five of the 11 circuits are now in agreement on the same matter.

Importantly, this Court's recent denial of certiorari in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra,* should settle this case out-of-hand. While discussed more fully below, *Hydrokinetics* held that the non-resident defendant did not purposefully avail itself of the privilege of conducting business within the forum state, or invoke the benefits and protections of the forum state's laws, so as to warrant the exercise of personal jurisdiction. Because *Hydrokinetics'* factual and legal issues were substantially similar as here, there is no need for review.

The Opinion Below does not conflict with any decision of the Florida Supreme Court on the same matter.

This is because *the Florida Supreme Court has never ruled on the same matter.*[3] Moreover, there is Florida appellate case law (discussed below) to support Appellee's position here.

Finally, the Circuit Court has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. To the contrary, the Opinion Below comports with this Court's rulings on "due process" as found in the long litany of personal jurisdiction cases handed down by this Court since 1878 (Jurisdictional Statement, at 16, n. 20).

COUNTER STATEMENT OF THE CASE

Summary

Appellee's agreements with Burger King required rent to be mailed to Miami, Florida, however, the record is void of any proof that even one such payment was made. Other than this obligation to mail such payments, Rudzewicz had absolutely no contacts with Florida.

Burger King argues that the failure of Rudzewicz to mail his monthly payments to Florida constitutes his failure to do an act—which was required to be done—in Florida. Only the Lease/Sublease Agreement (and not the Franchise Agreement) requires that all rent is to be mailed to a post office box, at a general mail facility, in Miami, Florida (Ex 9, paragraph 14.2; Tr 85).

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(3) The only cases Burger King offers to the contrary are five unreported Burger King cases in Miami's federal district court. In the Opinion Below, the 11th Circuit overturned the basis for these five unreported district court decisions. Jurisdictional Statement, 7.

The Florida long-arm statute allows for *in personam* jurisdiction where a non-resident fails to do an act—required by the contract to be done—in Florida. Of course, there must also be the constitutionally-requisite "minimum contacts" between defendant and the forum state.

Appellee Rudzewicz moved to dismiss the Complaint for lack of personal jurisdiction. The District Court denied the motion.[4] Rudzewicz appealed to the 11th Circuit.

In appealing to this Court, Burger King incorrectly argues that the mere failure by Rudzewicz to mail his monthly rent check to Florida supplies sufficient "minimum contact" to invoke personal jurisdiction.

Burger King improperly fashions their Jurisdictional Statement as an "appeal as of right," despite the fact that the Circuit Court never declared the Florida long-arm statute unconstitutional; the Circuit Court let the Florida long-arm statute stand unaffected and held:

> . . . the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process (Jurisdictional Statement, A17-18).

Background

John Rudzewicz and Brian MacShara desired to invest in and operate, respectively, a Burger King restau-

(4) After a bench trial, the Judge entered a judgment ($228,875.40) and awarded attorney fees ($30,000.00) and costs ($2,151.06). With judgment interest, that judgment would have been worth more than $335,000.00 today.

rant. Burger King was aware that Rudzewicz was to be the financial partner (Ex 1; Tr 39), while MacShara was to be the day-to-day operating partner (Exs 1, 11). Burger King granted a 20 year franchise (valued at $45,000.00) to, and entered into a 20 year lease (valued at $1,241,901.00) with Rudzewicz and MacShara (Ex 8, 9).

Franchisees Domiciled, Franchise Operated in Michigan

Franchisees are residents of, and are domiciled in, Michigan (Jurisdictional Statement A23-A24; Tr 39-40, 365, 391) at all times pertinent hereto. Moreover, the franchised business (Store 775) was located and operated in Michigan (Jurisdictional Statement, A24; Tr 85, 392).

All Preliminary Contacts in Michigan

All of the parties' preliminary contacts which related, or gave rise, to jurisdiction occurred in Michigan.

Burger King is a Florida corporation (Jurisdictional Statement, A23) and maintains a district office in Michigan which supervised Store 775 and serviced these franchisees (Exs P, T). The Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara (Jurisdictional Statement, A4).

The Prospectus, affecting this franchise offering, was registered with Michigan's Department of Commerce (Exs M-B, M-C) and mailed to franchisees in Michigan (Ex 21).

The parties' very first discussions about a Burger King restaurant occurred in Michigan in 1977 (Tr 473) and all subsequent meetings and consultations affecting this transaction occurred in Michigan (Tr 506).

Burger King interviewed the prospective franchisees and communicated their approval in Michigan. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application (Jurisdictional Statement, A4). The acceptance letter was mailed from Burger King's Michigan district headquarters to Rudzewicz who was situated in Michigan (Ex 2).

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion. Following corporate approval, headquarters then mailed to Rudzewicz copies of the completed documents for his files (Jurisdictional Statement, A4).

Neither franchisee ever went to Florida to execute any agreement whatsoever (Tr 201, 220), nor was any part of the franchised restaurant business ever conducted by franchisees in Florida. In fact, franchisee Rudzewicz has never set foot in Florida to transact any business with respect to Burger King or this franchise.

Franchise Offer Made/Accepted in Michigan

The "offer" of this particular franchise was in the form of the Preliminary Agreement (Ex 3), which was sent to franchisees who were in Michigan (Ex 4). Subsequent requests made by Burger King for Franchisees to execute this Preliminary Agreement were mailed to Michigan (Exs 5, 6); ultimately, it was executed by franchisees and returned to Burger King. In turn, Burger King accepted that "offer," by executing it, and communicated this acceptance to franchisees who were in Michigan (Ex 7).

The "offer" by Burger King of the Franchise Agreement (Ex 8) and the Lease/Sublease Agreement (Ex 9) was sent to franchisees in Michigan (Tr 22-23, 202) for them to sign in Michigan (Tr 201, 220). In fact, franchisee Rudzewicz executed these documents at a Michigan closing ceremony attended by employees of the Michigan district office (Tr 365, Jurisdictional Statement, A4) and returned them to Burger King with the $45,000.00 consideration (Ex 10) on June 4th. After their execution by Burger King, this acceptance by Burger King was communicated to franchisees in Michigan as the two Agreements (Exs 8, 9) were returned to franchisees in Michigan (Ex K; Tr 314) MCL 445.1504 (2), (3).

Continuous and Systematic Business in Michigan

Franchisee Rudzewicz purchased supplies and equipment from the Michigan offices of Burger King's Distron and Davmor Divisions; in exchange, payment was mailed to Burger King's district office in Michigan (Ex M-A; Tr 156).

The $45,000.00 consideration for the franchise fee and the site development fee was drawn on and certified by a Michigan bank (*viz.*, Michigan National Bank) and conveyed to Burger King's Michigan district representatives at the closing in Michigan, upon the execution of the Franchise and Lease/Sublease Agreements (Ex 10).

All notices of delinquency, default, and termination were sent to franchisees who were in Michigan (Exs A, B, E, F, G, J, V, M-F, M-l, 17, 18 and 19).

No Continuous and Systematic Business in Florida

Franchisees did not have a place of business in Florida, nor were they ever licensed or authorized (as a

corporation, partnership, or under an assumed name) to do business in Florida; franchisees never had an agent for the service of process in Florida. Franchisee Rudzewicz never performed any act in Florida related to Burger King, never provided a related service in, or sold a related product that reached, Florida. Franchisees never signed any agreement in Florida, never had any employee based in Florida, and never recruited any employee from Florida. In addition, Franchisees never owned any real property in Florida, never maintained any office or establishment there, and never maintained any business records in Florida.

Appellee carried on no continuous or systematic general business in Florida.

The sole "contact" Rudzewicz had with Florida was a non-negotiable obligation, unilaterally imposed on him by Burger King, to mail monthly payments to Florida (rather than mailing them to Burger King's Michigan district office).

Franchisee did not purposefully avail himself of any benefit or obligation in Florida, other than to sign, in Michigan, a non-negotiable, boiler plate Franchise Agreement which contained a Florida "governing law" (though no "choice of forum") provision.

Franchisee did not take advantage of the economic benefits and opportunities offered by Florida.

Florida was not significantly affected by Appellee's franchise activities; no taxes were paid in Florida and no employees were located there.

ARGUMENT

Burger King's Policy Objective

Let us be blunt about what Burger King is attempting to undo by this appeal. Burger King wants to sue all franchisees—not where those franchisees are found but, rather, in Miami. In headlong pursuit of this policy, motivated solely by self-interest, Burger King sues everyone in Florida.

In furtherance of this self-centered policy, Burger King even has sued a Hawaii corporation in Florida. Burger King boldly alleged a breach of contract because payment was not made " . . . on a shipment originating in California and delivered in Hawaii with payment to be made to a California address."[5-6] Burger King unsuccessfully argued that the proper forum state was Florida (where Burger King resides).

As with this Hawaiian defendant, it is eminently unfair and unreasonable to subject franchisees—like Rudzewicz—to suit in Florida where they have no significant contacts that are directly related to the underlying cause of action.

Burger King does not conceal its policy objective in this case. Since 1978, Burger King has sued its franchisees in U.S. District Court, Southern Division at Miami, Florida, rather than where they are domiciled (Jurisdictional Statement, A21). Burger King makes no pretext about this constitutionally brash appeal. Incredulously, Burger King has the unmitigated gall to instruct this Court:

(5-6) *Burger King Corporation, d/b/a Distron v. CPM&F, Inc.*, 537 F.Supp. 651, 652 (S.D. Fla. 1982).

> . . . it should be noted that Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff (Jurisdictional Statement, 27).

Burger King can charge sufficient royalties to finance potential litigation in the states where its franchises are located. Conversely, the franchisee has no power to negotiate a reduced royalty to finance a defense if sued in Florida.

The 11th Circuit was cognizant of the consequences for other franchisees if Burger King were not sandwiched into a more equitable position. The 11th Circuit was:

> . . . troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts (Jurisdictional Statement, A-13).

In Burger King's multinational, corporate opinion:

> [t]his case may determine whether [Burger King] must litigate not under a coherent set of [Florida] laws enforced in [Florida]—but wherever a *disputatious franchisee* may reside (Jurisdictional Statement 15, emphasis added).

Yet, it was the threat of this very abuse, this prostitution of due process and the "minimum contacts" requirements, that has spurred the enactment of the Michigan Franchise Investment Act. The 11th Circuit also noted that "[i]n recent years, certain states have moved to enact statutes to police the more flagrant excesses of franchises. Annot, 67 A.L.R.3d 1299, 1301" (Jurisdictional Statement, A16).

Therefore, by this appeal, Burger King arrogantly attempts to attenuate the due process protections of the

Constitution in their relations with their franchisees throughout the country. Burger King's corporate legal policy, as regards suits against its franchisees, is simply this: regardless of the lack of "minimum contacts," sue them in Miami, not where they are found.

While Burger King nationally advertises that you can "Have it your way," when it comes to *in personam jurisdiction,* Burger King prefers to have it their way—in Florida.

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NO APPEAL AS OF RIGHT BECAUSE FLORIDA STATUTE NOT DECLARED UNCONSTITUTIONAL

Constitutionality of Statute Unaffected

The Circuit Court never declared—as unconstitutional—Sec. 48.193(1)(g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida).

Plain and simple: no where in the Opinion Below did the Circuit Court declare the Florida long-arm statute unconstitutional. Burger King engages in a process of intellectual self-deception by suggesting that the 11th Circuit nullified that Florida long-arm statute. It didn't happen; that statute remains intact.

Quite clearly, the constitutional prerequisite to the exercise of personal jurisdiction is to assure that the defendant has "minimum contacts" with the forum state. Thus, provided that there are the statutorily required "minimum contacts" in Florida, that state's long-arm statute is still operative.

The provision of the Florida long-arm statute in question here is one that vests *in personam* jurisdiction where the non-resident defendant fails to do an act, required to have been done, in Florida. There is nothing unconstitutional *per se* about such a provision.

There are still acts which, if not done in Florida, may invoke personal jurisdiction under Florida's long-arm statute. For example, given constitutionally-mandated "minimum contacts," there is personal jurisdiction under Florida's long-arm statute where there is a failure by a non-resident defendant, under the terms of a contract, to provide prepaid services in Florida[7] or honor a guarantee of a Florida contract.[8]

The reach of Florida's long-arm statute is a question of state law. Correspondingly, federal courts are required to accept the interpretation given that statute by the state's supreme court. Nonetheless, the federal courts are not only permitted, but mandated, to determine the extent to which the reach of Florida's long-arm statute is limited by constitutional due process.[9]

Thus, here the 11th Circuit did not declare that particular Florida long-arm statute unconstitutional. Rather, it only held that the circumstances under which Rudzewicz was forced to defend himself " . . . would offend the fundamental fairness which is the touchstone of due process." Therefore, Burger King has no "appeal as of right."

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(7) See *Lacy v. Force V Corporation*, 403 So.2d 1050 (Fla. 1st D.C.A. 1981).

(8) See *Horace v. American National Bank and Trust Company*, 251 So.2d 33 (Fla.D.C.A. 1971).

(9) *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

Court Only Held "No Minimum Contacts" Here

> **The Circuit Court only held that "a Florida court can [not] exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Florida."**

Burger King here obliquely attempts to pull the proverbial wool over this Court's judicial eyes. Burger King falsely characterizes 10 major state court "holdings" as supporting its untenable position. Appellant argues that there are " . . . numerous state decisions holding that the contractual obligation to make payment in the forum state is a form of doing business . . . " (Jurisdictional Statement, 14-15).

In truth, not one of these decisions holds that a non-resident's failure to mail a check to the forum state—standing alone—is singularly sufficient to constitute "doing business" and, consequently, to subject that non-resident to personal jurisdiction. Only Florida cases support this absurb prostitution of constitutional due process protections. Furthermore, despite Burger King's arduous attempt to show what constitutes "doing business" in the state of Florida, it has lost sight of the issue in this appeal:

> Whether breaching a contract by failing to make a payment by mail to its offices in Florida constitutes sufficient "minimum contacts" with the state to warrant *in personam* jurisdiction over the defendant?

In considering the validity of the "breached contract" portion of Florida's "long arm" statute Florida's Third District Court of Appeals (although noting its disagreement) remarked about "minimum contacts" in the state, as provided by Section 48.193(1)(g) of the Florida Statutes, that:

> Federal court review of Section 48.193(1)(g), alone, as a sole basis for jurisdiction over a nonresident has been limited, but *Poston v. American President Lines, Ltd.*, 452 F.Supp. 568 (S.D.Fla. 1978), seems to agree with the Second District's holding in *Lakewood Pipe*, [379 So.2d 475 (Fla. 2d D.C.A. 1979)] and *Osborn v. University Society, Inc.* [378 So.2d 873 (Fla. 2d D.C.A. 1979)], that *constitutional requirements are not met by relying solely on Section 48.193(1)(g)*, Florida Statutes (emphasis added).[10]

No doubt, the reach of a state's long-arm statute is a question of state law. Indisputably, federal courts are required to accept interpretation given a long-arm statute by a state's supreme court. However, the extent to which the reach of the long-arm statute is limited by constitutional "due process" is a question of federal law. This necessitates an inquiry by the federal court into the facts forming a basis for personal jurisdiction.

The inquiry is two-part: first, whether the facts presented satisfy the requirements of the state's long-arm statute; and, second, whether the exercise of personal jurisdiction is consistent with federal constitutional due process.[11]

Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute; however, there were no "minimum contacts" in the state of Florida to satisfy federal due process requirements.

Thus, since both tests must be met, and because Rudzewicz lacked "minimum contacts," there is no jurisdiction. By application—not by construction—this Florida statute

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(10) *Engineered Storage* v. *National Partitions*, 415 So.2d 114, 115 n.3 (Fla. 3d D.C.A. 1982).

(11) *Scullin, supra*, at 312.

cannot be constitutionally applied to Rudzewicz by the federal district court in Florida.

NO SPECIAL OR IMPORTANT REASONS TO GRANT WRIT OF CERTIORARI

No Conflict Among Federal Circuits

The Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with the decision of another federal court of appeals on the same matter.

Burger King frankly concedes that, in addition to the decision it lost before the 11th Circuit, there are four more circuit court cases (cited below) having ". . . decisions consistent with the [Eleventh] circuit court's decision in this case" (see Jurisdictional Statement at 28, n. 48). Because Burger King agrees that these are the four other relevant and material circuit court holdings—each of which is contrary to the position that Burger King argues before this Court—it is important to explore these four circuit court cases, noting particularly the recent denial of *certiorari* in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra.*

Historically, there is an expansive body of law on "minimum contacts" beginning with *Pennoyer v. Neff*,[12] and through the post World War II era, continuing with the 1945 decision in *International Shoe Co. v. Washington*;[13] *McGee v. International Life Ins. Co.*;[14] *Hanson v.*

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(12) 95 U.S. 714 (1878).

(13) 326 U.S. 310 (1945).

(14) 355 U.S. 220 (1957).

Denckla;[15] *Shaffer v. Heitner;*[16] *Kaulko v. Superior Court of California;*[17] *World-Wide Volkswagen Corp. v. Woodson.*[18]

Moreover, since 1974, a total of five circuit courts have ruled on the very issue now before this Court. Not surprisingly, there is unanimity—and no conflict—on this personal jurisdiction issue among the 5th, 6th, 7th, 8th, and 11th Circuits.

8th Circuit Court of Appeals

In *Scullin Steel Co. v. National Railway Utilization Corp., supra,* the trial court dismissed a Complaint for lack of personal jurisdiction. Scullin Steel unsuccessfully protested, arguing that, because all payments were sent to Scullin Steel in the forum state (Missouri) by the non-resident Defendant (in Pennsylvania), that there were "minimum contacts" to support personal jurisdiction. To the contrary, the 8th Circuit held that:

> the use of interstate facilities (telephone, the mail), [and] the making of payments in the forum state . . . are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process. *See . . . Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.,* 558 F.2d at 453 (use of facilities of interstate commerce); *McQuay, Inc. v. Samuel Schlosberg, Inc.,* 321 F.2d 902, 905-06 (D.Minn. 1971) (payment within forum).

Id. at 314.

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(15) 357 U.S. 235 (1958).

(16) 433 U.S. 186 (1977).

(17) 436 U.S. 84 (1978).

(18) 444 U.S. 286 (1980).

If the 8th Circuit was confronted with the Burger King case, like *Scullin Steel,* it too would have dismissed the Complaint for lack of personal jurisdiction.

7th Circuit Court of Appeals

In *Telco Leasing, Inc. v. Marshall County Hospital,*[19] there were similar facts, as in *Scullin Steel.* Again, the trial court dismissed the complaint for lack of personal jurisdiction; the 7th Circuit affirmed the dismissal.

Telco Leasing, an Illinois lessor, attempted to obtain personal jurisdiction over a non-resident lessee, a Mississippi hospital, by claiming that "minimum contacts" were established by the non-resident's causing rental payments to be delivered to Plaintiff in the forum state, and the fact that Defendant signed a lease (while outside of the forum state) which provided that the lease would be binding ". . . when accepted by Lessor in the State of Illinois . . .," as well as various written and telephone communications, made by the non-resident Defendant to Plaintiff's offices in the forum state, *Id.* at 51. The trial court dismissed the complaint for lack of personal jurisdiction.

Quoting from another Seventh Circuit case, the trial court proclaimed:

> Whether or not there are sufficient minimum contacts to comport with due process cannot be determined by any set formula or rule of thumb, but must rest on a consideration of what is fair and reasonable in the circumstances of each particular case. *Hutter Northern Trust v. Door County Chamber of Commerce,* 403 F.2d 481 (7th Cir. 1968).

Id. at 50.

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(19) 586 F.2d 49 (7th Cir. 1973) (1878).

Like Burger King, Telco Leasing unsuccessfully contended that their boiler-plate, form lease established personal jurisdiction over the non-resident defendant since:

> . . . the contract is accepted in Illinois by the plaintiff corporation, and the non-resident defendant executes the form leases outside of Illinois and, pursuant to the leases, causes rental payments to be mailed to plaintiff's Illinois offices over a period of two years, the non-resident defendant can be said to have "transacted business" in Illinois and to have had "minimum contacts" with the State of Illinois. . . .

Id. at 51.

Unequivocally, 7th Circuit Court held that Telco Leasing could not assert any personal jurisdiction in Illinois over the Mississippi hospital defendant by finding:

> . . . it is not the terms of the lease that are controlling, but all the facts and circumstances of the transaction, for it is from the total picture that we determine whether or not the exertion of jurisdiction would comport with the notions of fair play and substantial justice.

Id. at 52.

If the 7th Circuit were confronted with the Burger King case, like *Telco Leasing*, it too would have dismissed the Complaint for lack of personal jurisdiction.

5th Circuit Court of Appeals

Similarly, in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra*, the 5th Circuit Court of Appeals affirmed the dismissal of the Complaint, filed in Texas against a non-resident, Alaska buyer. The 5th Circuit held that the Alaska firm did not purposefully avail itself of the privilege of conducting business within Texas or invoke the benefits and protections of Texas law so as to warrant

exercise of personal jurisdiction. The Alaska firm merely purchased equipment from a Texas firm to be shipped to the Klondike.

The facts in *Hydrokinetics* revealed that the contract negotiations were conducted by telex, telephone, and letter. Also, while negotiations were underway, two officers of the Alaska, non-resident buyer visited the seller's plant in Texas to inspect the equipment and facilities.

In dismissing the Complaint, the trial court concluded that "the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits." *Id.* at 1027-1028. While the dissenting judge disagreed with the majority's facts, he quoted from *Mississippi Interstate Express, Inc. v. Transpo, Inc.*:[20]

> When a nonresident defendant takes "purposeful and affirmative action," the effect of which is to "cause business activity, foreseeable by [the defendant], in the forum state," such action by the defendant is considered a "minimum contact" for jurisdictional purposes. *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir. 1981). "When a defendant purposefully avails himself of the benefits and protection of the forum's laws —by engaging in activity . . . outside the state that has reasonably foreseeable consequences in the state —maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice." *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1268 (5th Cir. 1981).

Id. at 1032.

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(20) 681 F.2d 1003, 1007 (5th Cir. 1982).

If the 5th Circuit were confronted with the Burger King case, like *Hydrokinetics,* it too would have dismissed the Complaint for lack of personal jurisdiction.

6th Circuit Court of Appeals

In *Weller v. Cromwell Oil Co.,*[21] the facts parallelled those in the Burger King case. Like ships passing in the night, there were some tangential contacts between the California-based, non-resident defendants and the Ohio-based plaintiff. However, these tangential contacts were only by mail and telephone. Indeed, the mail was sent from California and the telephone calls were made from there.

The 6th Circuit, as did the District of Columbia Appeals Court, refused to "delve into a magical mystery tour of 'projecting presences.'" *Id.* at 930. The Sixth Circuit Court held that Ohio could not assert personal jurisdiction over the non-resident defendants.

These non-residents were California residents; they were served with process in California; they were never in Ohio to commit any act or omission; there was no evidence that any agent of these non-residents was in Ohio to negotiate this contract; the telephone calls were made, and the correspondence mailed, from California.

As with Burger King, the *Weller* court held that mere contacts by mail or telephone do not confer personal jurisdiction upon a non-resident under the "transacting business" clause of a state's long-arm statute. Simply, Weller did not meet his burden of proof:

> The burden of proof to establish jurisdiction over the individuals was upon the plaintiff. *McNutt v.*

(21) 504 F.2d 927 (6th Cir. 1974).

> *General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Schuckman v. Rudenstein,* 164 F.2d 952 (6th Cir. 1947).

Id. at 314.

As with *Weller,* neither did Burger King meet its burden of proof. Burger King could only establish that the most miniscule qualitative contact—an obligation for Rudzewicz to have mailed to Florida his payments. In fact, Burger King did not establish that one such payment was ever received, despite the obligation.

If the 6th Circuit were confronted with the Burger King case, like *Weller,* it too would have dismissed the Complaint for lack of personal jurisdiction.

Unanimity Among Circuits that have Decided

Since there is no conflict among the circuits which have ruled on this same matter, and because of the recent denial of *certiorari* by this Court in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra,* there is no special or important reason to grant the Writ of Certiorari here.

No Conflict with Florida Supreme Court

The Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with the decision of the Florida Supreme Court on the same matter.

The Florida Supreme Court has never decided the same matter as presented here. As "Florida precedent," Burger King has only produced federal decisions—where it was the plaintiff—from the United States District Court for the Southern District of Florida. Significantly, the 11th Circuit has overturned that so-called "Florida precedent."

In fact, the Florida state court is sympathetic to the constitutional "minimum contacts" test. In *Osborn v. University Society, Inc.,*[22] the Florida appellate court held:

> under a given factual situation, even though a nonresident may appear to fall within wording of the long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state.

Subsequently, the Florida Appeals Court held that a contractual obligation standing alone, which requires payment to be made to a creditor in Florida, was not enough to meet the "minimum contacts" standard. *Lakewood Pipe of Texas, Inc. v. Rubaii.*[23]

In the only statement made by the highest court of the state, although dealing with a product liability action rather than a breach of contract action, the Florida Supreme Court reasoned, in determining when sufficient "minimum contact" had been made with the forum state:

> The inquiry into whether there are "minimum contacts" between the forum state and a nonresident business enterprise must look at the nature of the defendant's activities in the state. Continuous and systematic activities provide a reasonable basis for the assertion of jurisdiction.

Ford Motor Company v. Atwood Vacuum Machine Company.[24] Moreover, in circumstances in which "continuous and systematic activities" with the forum state were not established, the court, in citing *International Shoe,* found:

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(22) 378 So.2d 873, 874 (Fla. 2d D.C.A. 1979).

(23) 379 So.2d 475 (Fla. 2d D.C.A. 1979).

(24) 392 So.2d 1305, 1310 (Fla. 1981).

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. The clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id., at 1310.

In further elaboration on the Florida Supreme Court's decision, a Florida appeals court (1st D.C.A.) determined:

> Unquestionably the single most important factor to be considered is whether "the defendant's conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there . . . ." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 297. *It is essential that this circumstance be considered from the perspective of the defendant—not from that of the plaintiff* (emphasis added)

Lacy v. Force V Corporation, supra, at 1054.

The Florida Supreme Court, as well as the various Appellate Courts, all require, in the absence of "continuous and systematic activity" within the state, such contact with the state must comport with the "fundamental fairness" precept provided by *Pennoyer, supra.*

The Florida Supreme Court has adopted the reasoning of this Court in a manner that reflects the intent and purpose of the protections provided by the Due Process Clause of the Fourteenth Amendment:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v Denckla,* 357 U.S., at 253 . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by

procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Ford Motor Co. v. Atwood Vacuum Machine Co.[25]

The state court of last resort (*viz.*, the Florida Supreme Court) has not ruled on this specific matter. Thus, no conflict exists between the federal district court's interpretation of this Florida statute, as compared to the Florida appellate courts' interpretation. Consequently, there is no special or important reason to grant the Writ of Certiorari here.

No Radical Departure

The Writ of Certiorari should be denied because the Circuit Court has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Burger King cites an inaction by Rudzewicz as the basis for a "minimum contact."

The judicial history of the constitutional interpretation of the Due Process Clause of the Fourteenth Amendment is replete with instances in which requirements of "minimum contact" have been met, as well as instances where the requirements were not. This court has found that personal jurisdiction exists when a corporation "purposefully avails itself of the privilege of conducting activities within the forum state," *Hanson v. Denckla, supra,* at 253. A person's minimum contacts with the forum state must assure that suit there does not offend

(25) 392 So.2d 1305, 1311 (Fla. 1981).

"traditional notions of fair play and substantial justice," *Milliken v. Meyer,* 311 U.S. 457, 463 (1940).

The decision of the Eleventh Circuit has not departed from the accepted and usual course of judicial proceedings, as established by this court or the Florida Supreme Court, so as to warrant *certiorari.*

As discussed above, any contact that Rudzewicz may have had with the forum state was minimal, at best, and certainly not enough to satisfy the requirements of this Court for "minimum contact" sufficient to establish personal jurisdiction over the defendant.

Burger King fantasizes a "parade of horrors" argument, in its attempt to wrangle out a writ of certiorari where no "appeal as of right" exists. Burger King exaggerates, in its Jurisdictional Statement (at 15), that the 11th Circuit opinion "implicates the 'doing business' legislation of almost every state." However, the "doing business" legislation of Florida and every other state is not at issue here, rather, it is the issue of requisite "minimum contact" with the forum state which will assure that personal jurisdiction over the defendant will not ". . . offend the fundamental fairness which is the touchstone of due process." Jurisdictional statement, A18.

CONCLUSION

It is clear from the record below, as well as the Eleventh Circuit's decision that:

A. Subsection "g" (48.193(1)(g)) of the Florida "long arm" statute was never held "unconstitutional."

B. The Eleventh Circuit Court of Appeals ruled that the Florida Statute's application to these particular circumstances violated Rudzewicz's constitutional right to due process.

C. The Eleventh Circuit has not ruled inconsistent with any ruling of the Florida Supreme Court on the issue.

D. The rulings of the various Florida Court's of Appeal are consistent with the ruling of the Eleventh Circuit.

E. There are no Federal decisions which are contrary to the decision of the Eleventh Circuit; in fact, the recent denial of *certiorari* in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra* begs a similar denial of *certiorari* here.

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RELIEF

Affirm the Judgment

It is manifest that the questions, on which the decision of this cause depend, are so unsubstantial as not to need further argument. Therefore, this Court should affirm the judgment of the Circuit Court.

Deny Writ of Certiorari

Finally, there are no special or important reasons to grant a Writ of Certiorari.

The Opinion Below does not conflict with the decision of another federal court of appeals on the same matter;

neither does the decision conflict with a decision of the Florida Supreme Court on the same matter; nor has the decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Therefore, this Court should not set this case for argument and, instead, should deny certiorari.

Respectfully submitted, August 19, 1984

OEHMKE LEGAL ASSOCIATES
Professional Corporation

By Thomas H. Oehmke, Esq.
Counsel for Appellee

With Lawrence J. Johnson, Esq.
Attorney, On the Brief

APPENDIX

Appellee incorporates by reference the Appendix to Appellant's Jurisdictional Statement.